In the Supreme Court of the United States.

OCTOBER TERM, 1918.

GABE E. PARKER, GABE E. PARKER as superintendent for the Five Civilized Tribes, W. M. BAKER, and W. M. BAKER as cashier for the Five Civilized Tribes, appellants,

v.

EASTMAN RICHARD AND R. D. MARTIN, co-administrators of the estate of SAMUEL RICHARD, deceased.

Nos. 313 and 563.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

STATEMENT.

The appeal in case No. 313 (R. 49) is from a decree of the Circuit Court of Appeals for the Eighth Circuit (R. 47) which, reversing a decree of the District Court for the Eastern District of Oklahoma (R. 36), directed the appellants to pay over to the appellees $216,154.16 received by them as royalties under an oil and gas lease on a Creek Indian allotment in

Oklahoma, and enjoined them from collecting any further royalties under the lease.

Opinions: D. C. (R. 32); C. C. A., Stone, C. J., dissenting (R. 43), 245 Fed. 330.

In case No. 563 the parties are the same and the appeal is from an order of the Court of Appeals dismissing an appeal from a decree of the District Court entered in conformity with the mandate of the Court of Appeals in No. 313. The appeal to this court in No. 313 was properly taken in time to bring the case up for review but too late to supersede the decree appealed from. *Title Guaranty Co.* v. *General Electric Co.*, 222 U. S. 401. And the appeal in No. 563 was taken to prevent the money from being paid over and thus obviate any difficulty in dealing with the cause in the District Court if the decree of the Court of Appeals in No. 313 should be reversed. *Merrill* v. *National Bank*, 173 U. S. 131, 134, 147. Hence the determination of both cases depends upon the record in No. 313, to which alone reference will be made.

The case was heard on the petition (R. 2), the answer (R. 8) and a stipulation (R. 39), which show the following undisputed facts: The oil and gas lease in question covers the 160-acre allotment of Samuel Richard, a minor full-blood Creek Indian. R. 8, 39. It was executed April 13, 1912, on behalf of the minor by his father and guardian, Eastman Richard. R. 11, 16. It was approved by the court having jurisdiction of the estate of the minor (R. 9, 39),

and June 8, 1912, it was approved by the Secretary of the Interior. R. 17. The allottee died January 24, 1916, leaving as his sole heir at law his father, Eastman Richard, also a full-blood Creek Indian. R. 9, 40. The fund in controversy, amounting to $216,154.16 at the time of filing the petition, consists of royalties accruing under the lease, the greater portion prior to the death of the allottee, which were received by the appellants pursuant to the terms of the lease, and are held by them in their official capacity. R. 5, 9, 40.

The appellees, as administrators of the estate of the deceased allottee, sued the appellants, as Indian superintendent and Indian cashier, to compel them to pay over this fund and to enjoin the further collection of royalties, claiming that the death of the allottee terminated the jurisdiction of the Secretary of the Interior over the lease and its proceeds. R. 4, petition, par. viii. The appellants claim the right to hold the fund already accumulated and to collect future royalties for use and disposition according to law and the rules and regulations of the Secretary of the Interior for the benefit of the full-blood heir of the deceased allottee. R. 10, answer, par. v.

The District Court ruled that so long as the allotment remained subject to restriction on alienation, as it did in the hands of a full-blood Indian heir under the act of May 27, 1908, 35 Stat. 312, the proceeds of the oil and gas lease remained subject to the regulations of the Secretary of the Interior

made during the life of the allottee. R. 34, 35-36. The petition was therefore dismissed. R. 36.

The Court of Appeals to the contrary ruled, Stone, C. J., dissenting, that the jurisdiction of the Secretary of the Interior over the proceeds of the lease was taken away by section 9 of the act of May 27, 1908, 35 Stat. 315, which authorized a conveyance of the allotment by the full-blood Indian heir with the approval of the probate court. R. 45. The relief prayed for was therefore granted. R. 47.

QUESTION PRESENTED.

The various errors alleged in the assignment (R. 48) may be resolved into one proposition, viz:

The oil and gas lease on the allotment of the full-blood Creek Indian, Samuel Richard, and the proceeds of such lease remain subject to the rules and regulations of the Secretary of the Interior after the death of the allottee and descent of the land to Eastman Richard, a full-blood Indian.

ARGUMENT.

The oil and gas lease in question was executed, as shown in its preamble (R. 12), "under and in pursuance of the provisions of the act of Congress approved May 27, 1908," 35 Stat. 312. Section 2 of that act provides:

> That leases of restricted lands for oil, gas, or other mining purposes * * * may be made, with the approval of the Secretary of the Interior, under rules and regulations pro-

vided by the Secretary of the Interior, and not otherwise.[1]

The applicable regulations are found in a pamphlet published by the Interior Department, entitled "Regulations Governing Leasing of Lands and Removal of Restrictions of Members of the Five Civilized Tribes, Reprinted June 1, 1916." In conformity to section 20 of these regulations adopted April 20, 1908 (p. 10),[2] this lease provided (R. 12) for payment

[1] The entire section reads as follows:

"SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas, or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior and not otherwise: *And provided further*, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

[2] All royalties, rents, or payments due under leases which have been or may be approved by the Secretary of the Interior shall be paid to the United States Indian agent at Union Agency, Muskogee, Okla., or to such other person as may be designated by the Secretary of the Interior, for the benefit of the various lessors, or, in cases of minors and incompetents, shall be deposited as hereinafter specified. (See amendment of July 23, 1910, as to minors and incompetents, p. 31.) No royalties on such leases shall be paid by the lessee direct to the lessors or their representatives.

of the oil and gas royalties agreed on "to the United States Indian superintendent, Union Agency, Muskogee, Oklahoma, for the lessor." Section 25 of the regulations, as amended July 23, 1910 (p. 31)[1] and November 29, 1912 (p. 38),[2] provides for discretionary use of the funds derived from leases on restricted Indian lands for the benefit of the Indians to whom they belong. These regulations were made part of the lease in question by paragraph 8 thereof, which provides (R. 15) that:

> This lease shall be subject to the regulations of the Secretary of the Interior, now or

[1] All royalties, rents or payments accruing under any lease made for or on behalf of any minor or incompetent shall be held by the United States Indian superintendent, Union Agency, or such other disbursing officer as may be designated by the Secretary of the Interior, to the credit of the guardian (or curator) of such minor or incompetent and shall be paid to such guardian (or curator) upon voucher executed by him and approved by the judge of the county (probate) court having jurisdiction of the estate of such minor or incompetent (the form of such voucher to be prescribed by the Department), or upon authority of such court in the form of an order satisfactory to said superintendent or other officer in charge of the Union Agency.

[2] *Provided, however*, That the said superintendent, or other officer in charge of the Union Agency, is authorized, in his discretion, where considered for the best interests of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents, or payments accruing under any lease have been paid to said superintendent, to withhold the disbursement of such royalties, rents or payments, wholly or in part from any such adult, or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs.

> hereafter in force, relative to such leases, all of which regulations are made a part and conditions of this lease.

The lease in question and the regulations fully recognize the termination of the Secretary's jurisdiction over leases and their proceeds upon the removal of restrictions on alienation of the land. In conformity to section 42–d of the Regulations (p. 19),[1] paragraph 12 of the lease provided (R. 15):

> In event restriction on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the day such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease and all payments required to be made to the United States Indian superintendent shall thereafter be made to lessor or the then owner

[1] In event restrictions are removed from a part of the land included in a lease for oil, gas, or other mineral purposes, the entire lease shall continue subject to approval and supervision of the Secretary of the Interior, and all royalties thereunder shall be paid to the Indian agent until such time as the lessor and lessee shall furnish the Secretary of the Interior satisfactory information that adequate arrangements have been made to account for the oil, gas, or mineral upon the restricted land separately from that upon the unrestricted. Thereafter the restricted land only shall be subject to the supervision of the Secretary of the Interior, provided that the unrestricted portion shall be relieved from such supervision as in the lease or regulations provided.

> of said lands in person or be deposited to the credit of said lessor or his assigns at the Eufala National Bank, of Eufala, Oklahoma, or at such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

The decision of the Court of Appeals is founded upon the following provision of section 9 of the act of May 27, 1908, 35 Stat. 315:

> That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.

The land does not by virtue of this provision cease to be "restricted land" on the death of the allottee where it descends to a full-blood Indian heir. The term "restricted lands," as used in the provision of section 2 forbidding oil and gas leases on such lands except "under rules and regulations provided by the Secretary of the Interior," obviously means lands not subject to the unrestricted power of alienation. A power of alienation which is subject to judicial approval certainly is restricted. Section 22 of the act of April 26, 1906, 34 Stat. 145, contains a provision exactly the same in effect as that of section 9 of the

act of 1908 above quoted, except that conveyances of full-blood Indian heirs are there made subject to approval by the Secretary of the Interior, and that provision has been regarded by this court as a "restriction" on the land.

In *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 308, construing the provision of 1906, reference was made to the similar one of 1908 as showing "that, in the understanding of Congress at least, *restrictions* still existed so far as the inherited lands of full-blood Indians were concerned." And the court held that "it was within the power of Congress to continue to *restrict alienation* by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands," and "to vary its *restrictions* upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian." P. 316.

In *Brader* v. *James*, 246 U. S. 88, 95, it was said that the act of 1906 was intended "to make requirements as to conveyances by full-blood Indians and the full-blood heirs of Indians, which should take the place of former *restrictions* and limitations." It was also said with particular reference to the provision for approval of conveyances by full-blood Indian heirs, that this legislation was "enacted in discharge of the Nation's duty of guardianship over the Indians." pp. 95–96. See also *Talley* v. *Burgess*, 246 U. S. 104, 107.

The decisions in these cases were followed in a case involving the similar provision of the act of 1908. *Sunday* v. *Mallory*, No. 100, decided January 7, 1919.

In *Heckman* v. *United States*, 224 U. S. 413, 436, referring to the acts of 1906 and 1908, the court said:

> These restrictions evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning.

In *Marcy* v. *Board of Com'rs*, 45 Okla. 1, 7, the Supreme Court of Oklahoma decided that inherited lands of full-blood Indian heirs under section 9 of the Act of 1908 were subject to the "supervision and control of a federal agency" and therefore "restricted lands" not subject to state taxation.

It is settled by these decisions that allotted lands inherited by full-blood heirs, requiring judicial approval for their conveyance under section 9 of the act of 1908, are "restricted lands," within the requirement of section 2 that such lands can not be leased for oil and gas purposes except "under rules and regulations provided by the Secretary of the Interior." It is also the doctrine of these decisions that so long as Indian lands are restricted, the guardianship of the United States continues. But to sustain the decision of the Court of Appeals in this case would terminate this guardianship and defeat this long-established governmental policy. The obvious purpose of the authority to make rules and regulations respecting the proceeds of oil and gas leases was to protect the full-blood Indians

against their own improvidence. But if the administrators in this case, of which Eastman Richard, the full-blood heir, is one, can recover such proceeds from the Government officers, a quarter of a million dollars in this case and millions of dollars in other cases will have to be turned over to improvident full-blood Indians.

It is said that the restriction may be removed by action of the probate court without reference to the Secretary of the Interior. This may be so, but such action can only be taken by approving a conveyance of the land. It is suggested that a mining lease is to that extent a conveyance of the land, and that if this lease were surrendered or cancelled, as it might be according to its provisions (R. 15, secs. 7, 9), another could be made with the approval of the court. It is true that such a lease would be regarded as a conveyance of an estate in the land at common law. *Eldred* v. *Okmulgee Loan & Trust Co.*, 22 Okla. 742, 746. But Congress was not dealing with estates at common law. It was dealing in one part of the act with conveyances of restricted lands and in another part with leases of such lands. The former were authorized by approval of the probate court, the latter by approval of the Secretary of the Interior under regulations prescribed by him, "and not otherwise." That Congress had in mind a definite distinction between the powers of the Secretary and the powers of the court, and that in case of conflict the powers of the Secretary should be exclusive, is shown by the provision immediately following the

leasing power of the Secretary in section 2, as follows:

> That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions.

We do not mean to contend that the word "incompetents" as here used necessarily was intended to include all adult full-blood Indians, although the national guardianship was continued over them because of their notorious incompetency as a class. But as it is obvious that the words "minors and incompetents" may include full-blood Indian heirs, it follows that the probate courts are forbidden to approve mining leases on the restricted lands of such heirs. In other words, whether the present appellee, Eastman Richard, is an incompetent or not because he is a full-blood Indian, it is certain that if he were a minor the probate court would have no power to approve an oil and gas lease of his inherited land. In the provision of section 9 of the act of 1908 no distinction is made between minor full-blood and adult full-blood Indians. In the governmental policy of protecting the Indians there is no reason for a distinction between minor mixed-blood and adult full-blood Indians. But that policy furnishes ample reason for giving the Secretary of the Interior exclusive authority over mining leases on the restricted lands of both classes. The authority of the probate courts of Oklahoma in all cases of Indians still under Federal guardianship is that of a Federal agency, subordinate

to the paramount authority of the United States. The Supreme Court of Oklahoma has so decided with respect to the authority of those courts to approve conveyances by full-blood Indian heirs under section 9 of the act of 1908. *Marcy* v. *Board of Com'rs*, 45 Okla. 1, 7. To the same effect is the decision of this court in *Truskett* v. *Closser*, 236 U. S. 223, 227.

CONCLUSION.

It is respectfully submitted that the decrees of the Circuit Court of Appeals in both cases should be reversed, that the decree of the District Court in No. 563 should be reversed, and that the decree of the District Court in No. 313 should be affirmed.

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MARCH, 1919.

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